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No. 96-1579

IN THE

Supreme Court of the United States

October Term, 1997

JAMES BROGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Should the "exculpatory no" doctrine, which bars prosecution under 18 U.S.C. § 1001, of a person who, upon inquiry, falsely denies his or her guilt to a federal agent, be embraced by this Court?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America, Appellee;

Robert Wiener, James Wiener, Richard Murphy, Michael Galati, Luis Cueto, John Pinto, Serge Jean-Jacques, Antonio DeJesus, Robert Humes, Joseph La Rosa, Defendants, Domenic Paciello, Reinaldo Roman, James Brogan, Defendants-Appellants.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

No. 96-1579

James Brogan, *Petitioner*,

v.

United States of America, *Respondent*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Appeals, *United States v. Wiener*, is reported at 96 F.3d 35 (2d Cir. 1996).

JURISDICTION

The Court of Appeals for the Second Circuit entered its judgment on September 16, 1996. A petition for rehearing and a suggestion for rehearing en banc were denied by the Court of Appeals on November 15, 1996. The petition for a writ of certiorari was filed on February 25, 1997, and was granted on June 9, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 1001 (1988), that provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Southern District of New York, Petitioner Brogan was convicted of making a false statement in violation of 18 U.S.C. § 1001, and accepting a $150 gratuity on December 14 1988 in violation of the Taft-Hartley Act. The December 14, 1988 payment of $150 was also charged as the acceptance of a bribe, but Brogan was acquitted on that count. He was sentenced to nine months imprisonment, two years of supervised release, and fined $4000. Execution of the sentence was stayed, and Brogan is currently at liberty.

Brogan was a union delegate. On October 4, 1993, at 6:00 PM, federal agents made a planned surprise visit to Brogan's home (App. 1, 3-5). At the time of the visit, the agents were aware of evidence that Brogan and others had accepted bribes (App. 2). Their purpose in making the visit was to convince Brogan to "cooperate" in their investigation

(App. 1). One of the agents asked Brogan if he had ever received any money or gifts from JRD, a real estate management company that employed members of Brogan's union (App. 2). In response to the question, Brogan simply said "no" (App. 2).[1]

At trial, the government offered evidence of three alleged payments made to Brogan prior to December 14, 1988. These three payments were ruled inadmissible, on statute of limitations grounds, as evidence of his accepting bribes or gratuities. The payments were, however, admitted in support of the false statement count.

On appeal, the United States Court of Appeals for the Second Circuit, while recognizing that it was out of step with seven other circuits, rejected the "exculpatory no" doctrine and affirmed the judgment of conviction. *United States v. Weiner*, 96 F.3d 35 (2d Cir. 1996). A petition for rehearing and suggestion for rehearing en banc were denied on November 15, 1996.

SUMMARY OF ARGUMENT

This case presents for the Court's decision the validity of applying the exculpatory no doctrine, in its truest and simplest form, to a charge of making a false statement in violation of 18 U.S.C. § 1001. The issue presented by this case in no way relates to situations in which the accused's words or conduct in any way go beyond a simple "no"

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[1]Brogan was not advised of his rights before being questioned and, as the government conceded in its brief below, Petitioner was not advised until *after* he had given the "no" response that making a false statement to a federal agent was a crime (App. 2).

response when asked by federal agents if he has committed a crime. Based upon the facts of this case, a discursive response by the accused, or *any* elaboration of his answer beyond the utterance "no," is not an issue for decision on this appeal.

One evening, unannounced, so as to exploit the advantage of surprise, federal agents possessed of evidence that certain union officials, including Brogan, had accepted bribes, appeared at Brogan's home to question him. Their purpose was not to ascertain whether or not Brogan was guilty, but to enlist his "cooperation" in their investigation.

After some innocuous questions, and without first apprising Brogan of his constitutional right to remain silent, or that lying in response to inquiries posed by federal agents constituted a crime, they asked if he had ever accepted bribes. Brogan simply responded "no," and did not elaborate upon that response in any way.

Obviously, the posed question was not asked so the truth of the response could be evaluated. Had the answer been the undoubtedly hoped for "yes," longstanding accepted investigative techniques would have dictated that this was the propitious opportunity to enlist Brogan's "cooperation": the promise of leniency in exchange for Brogan inculpating and testifying against others. Significantly, at the time of the agents' visit, the statute of limitations had run on three of the four payments the agents had in mind.

For a period spanning some forty years, various federal district courts and eight federal circuit courts of appeals, for sound, compelling and correct reasons, uniformly and without exception, upheld the validity of the exculpatory no doctrine. The courts provided numerous well-reasoned, and valid justifications for the proposition that an exculpatory no response is not cognizable under 18 U.S.C. § 1001; while

the criteria, or tests, employed by the different courts had a certain degree of variation, Brogan's conduct, his verbal "no" response, and the context in which it occurred would have been found non-criminal, as a matter of law, by any of the courts that had decided the issue.

The courts validating the doctrine did so in part out of a recognition that an individual in Brogan's circumstances is placed in a legally unfair and unacceptable position. When asked the question about his participation in a crime, the suspect is faced with a harsh trilemma. His choices are self-incrimination, prosecution under section 1001, or remaining silent where silence will likely be perceived, by both suspect and agent, as a tacit admission of guilt, and moreover, can be exploited to the suspect's detriment at a subsequent trial. The statute punishes suspects such as Brogan for refusing to admit their guilt, and thus violates the spirit of the Fifth Amendment.

The cases have also recognized the validity of the doctrine because an unadorned, unelaborated upon "no" does not result in the perversion of a governmental function (the "hallmark" of a section 1001 violation), is not capable of facilitating or promoting such a result, and is thus not a statement within the meaning of the statute. Competent government agents, the courts have observed, are affected not a wit by a suspect's denial of guilt when that denial takes the form of a simple "no" answer to their inquiries about his commission of a crime.

Furthermore, 18 U.S.C. § 1001 is that rare example of a statute, a literal reading of which must be rejected, pursuant to well established principles of statutory construction, because such a reading can lead to a litany of absurd results. Most significantly, perhaps, is that a literal reading of the statute invites overkill and abuse by the overly

zealous prosecutor. This case presents an excellent example of the realization of that formidable danger. Here, the statute of limitations had run as to all alleged payments save one. The statute of limitations was circumvented, however, and in effect revived, by the government's literal, but perverted, use of section 1001.

Lastly, the legislative history of section 1001 clearly indicates that it was never the intent of Congress that a false "no" response was to be a valid basis for conviction under the statute.

POINT I

BECAUSE OF SOUND, THOUGHTFUL AND COMPELLING REASONS, MOST OF WHICH HAVE BEEN RECOGNIZED BY EIGHT CIRCUIT COURTS OF APPEALS, THE "EXCULPATORY NO" DOCTRINE SHOULD BE ACCEPTED BY THIS COURT.

A. Introduction

As in effect at the time of Petitioner's "no" response, and his subsequent prosecution, 18 U.S.C. § 1001 (1988) provided:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Brogan was charged with violating section 1001 based upon his false "no" response to federal agents who asked if he had accepted bribes while a union delegate. Such a "no" response, as numerous courts have recognized, is not cognizable under the statute, and Brogan's conviction must therefore be reversed.

Judicial recognition and acceptance of the exculpatory no doctrine began in 1953 with *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953). Over the ensuing forty years, the exculpatory no doctrine was accepted by numerous federal district courts and eight circuit courts of appeals.[2] Although there are variations in scope and differences in the legal tests employed by the circuits, undoubtedly all of the courts that have recognized the doctrine would have found that the

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[2]*See, e.g., Moser v. United States*, 18 F.3d 469, 473-74 (7th Cir.1994); *United States v. Taylor*, 907 F.2d 801, 805 (8th Cir.1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir.1988); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir.1986); *United States v. Fitzgibbon*, 619 F.2d 874, 880-81 (10th Cir.1980); *United States v. Rose*, 570 F.2d 1358, 1364 (9th Cir.1978); *United States v. Schnaiderman*, 568 F.2d 1208, 1212 (5th Cir. 1978), *overruled by United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994); *United States v. Chevoor*, 526 F.2d 178, 183-84 (1st Cir.1975), cert. denied, 425 U.S. 935, 96 S.Ct. 1665, 48 L.Ed.2d 176 (1976).

proscription of the statute did not include Brogan's conduct, the mere utterance of the word "no."

Over the more than forty-year history of the exculpatory no doctrine, courts and commentators have articulated compelling, sensible and correct reasons for concluding that section 1001 does not reach simple exculpatory denials of guilt. These reasons include: 1) a simple denial of guilt is not a statement within the purview of section 1001 because it does not constitute the perversion of governmental functions that the statute was intended to prevent; 2) the cornered suspect faces the legally unacceptable and cruel trilemma of self-incrimination, being charged with a section 1001 violation, or remaining silent where that silence is likely to be regarded by his inquisitor as a tacit admission of guilt and exploited to the accused's detriment at a subsequent trial; and 3) a literal reading of the statute can easily lead to absurd results, especially when wielded as a tool in the hands of an overzealous prosecutor to punish for an utterance, albeit false, having no real consequence upon the legitimate function of the government agency to which it was made.

Moreover, Congress has clearly evidenced its intention that the statute not be directed at conduct consisting of nothing more than a mere denial of guilt in response to a federal agent's question.

B. A simple denial of guilt is not a statement within the purview of 18 U.S.C § 1001 because it does not result in perversion of governmental functions, which is what the statute was intended to prevent.

Section 1001 "was designed 'to protect the authorized functions of governmental departments and agencies from the

perversion which might result from the deceptive practices [the statute] described.'" *United States v. Woodward* 469 U.S. 105, 109 (1985) (citing *United States v. Gilliland*, 312 U.S. 86, 93 (1941)). Indeed, in reliance upon *Gilliland*, the perversion of governmental function has been characterized as "the hallmark of a § 1001 offense." *United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc).

It is inconceivable that Brogan's "no" response, in the context in which it occurred, can rationally be said to have perverted, or was capable of perverting, a governmental function. Thus, Brogan's "no" was not a statement within the purview of section 1001. *See, e.g., United States v. Bedore*, 455 F.2d 1109, 1111 (9th Cir. 1972) (finding that statute's history reveals that it was not intended to embrace "oral, unsworn statements, unrelated to any claim of the declarant to a privilege from the United States or to a claim against the United States, given in response to inquiries initiated by a federal agency or department, except, perhaps, where such a statement will substantially impair the basic functions entrusted by law to that agency." (internal citations omitted)).

The surprise visit to Brogan's home by the agents was not calculated to ascertain whether or not Brogan had accepted bribes. The agents did not ask their question so they could evaluate the truthfulness of the response. The surprise visit, coupled with the question, was intended to intimidate Brogan and, thus, persuade him to "cooperate"--to communicate to him that leniency would accompany "cooperation" and that recalcitrance, an unwillingness to "cooperate," would bring the full wrath of the government upon him. While his "no" answer may have disappointed the agents, it did not "pervert the investigator's function in the manner the statute was intended to combat." *United States v. Moore*, 27 F.3rd 969,

978 (4th Cir. 1994) (quoting *United States v. Cogdell*, 844 F.2d 179, 184 (4th Cir. 1988)).

In *Cogdell*, the defendant, interviewed by an agent at her home, denied her fraudulent involvement in the cashing of a check. The court, upholding the exculpatory no doctrine, stated:

> Cogdell's statements also meet the requirement that they not pervert an agency's basic functions. A trained agent cannot be overly surprised when a suspected criminal fails to admit guilt. "We presume that a thorough agent would continue vigorous investigation of all leads until he personally is satisfied he has obtained the truth." [*United States v.*] *Medina De Perez*, 799 F.2d [540,] 546 [(9th Cir. 1986)]. A false denial of guilt does not pervert the investigator's basic function in the manner the statute was intended to combat, but is merely one of the ordinary obstacles confronted in a criminal investigation. *Id.* at 546; *see also United States v. Lambert*, 501 F.2d 943, 946 (5th Cir. 1974) (en banc); *United States v. Bedore*, 455 F.2d [1109,] 1109-11 (9th Cir. 1972).

Cogdell, 844 F.2d at 184 (footnote omitted).[3]

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[3]The court distinguished Cogdell's statements from those in *United States v. Rodgers*, 466 U.S. 475 (1984), where the false report of a plot against the President's life "perverted the agencies' basic functions by 'turn[ing them] into . . . Missing Person's Bureau[s] for domestic squabbles.'" *Cogdell*, 844 F.2d at 184 n.6 (quoting *Rodgers*, 466 U.S. at 481). The *Cogdell* court observed that "[t]ypical of the kind of statements that are within the purview of section 1001 are false reports of crime made to federal law enforcement agencies that may engender groundless federal investigations." *Id.* (quoting *Bedore*, 455 F.2d at 1111). Similarly, for example, an answer that falsely alleges the guilt of another would also pervert basic agency functions by sending its investigators on a wild goose chase.

Brogan's "no" could not, and did not, pervert the authorized function of any governmental department or agency. Therefore, his simple denial was not a "statement" within the meaning of section 1001.

C. The cornered suspect faces the legally unacceptable and cruel trilemma of self-incrimination, being charged with a section 1001 felony, or remaining silent when his silence will likely be regarded as a tacit admission of guilt (as the suspect may well fear), and exploited to his detriment at a subsequent trial.

The suspect to whom federal agents pose the question of whether or not he has committed a crime has, *theoretically*, three choices: he can admit his guilt, thus incriminating himself, remain silent, or falsely deny his guilt. The key word is "theoretically." Context, the surrounding circumstances in which the suspect is confronted by his interrogators, converts the theoretical into reality, and it is within that reality--the real and oppressive confrontation the suspect faces, or reasonably believes he faces--that dictates or

determines what his real, rather than his theoretical, choices are.

The arrival of the agents at Brogan's door was not preceded by a polite call asking if they could come visit with him at a mutually convenient time to discuss their bribery investigation. Instead, their visit, previously unarranged, was calculated to take Brogan by surprise and to produce, with their knock in the night, shock, fright and anxiety. Brogan, inexperienced in confrontations with federal agents because of his prior lack of exposure to the criminal justice system, reacted just as the agents wanted and expected. They did not arrive with a surprise knock in order to create or foster a calm atmosphere. Their purpose was to instill panic so as to gain the upper hand. Surprise visits are the everyday work of federal investigators and these investigators knew it was not the everyday experience of Brogan to receive accusatory federal agents as uninvited guests in his home.

A suspect can remain silent in the face of inquiry by federal agents about his criminality. However, to argue silence was a viable choice for Brogan, and those similarly situated, is to ignore reality. Indeed, until the decision in *United States v. Rodriguez-Rios*, 14 F.3d 1040 (5th Cir. 1994) (en banc), no court interpreting the false statement clause of section 1001 had found that silence was an available option to a suspect questioned by federal agents.

1. The option to remain silent is illusory because it is an unnatural and illogical response to an accusation of wrongdoing by federal agents, one from which the suspect will likely believe the agents will infer guilt, and, further,

because silence can be used to undermine and denigrate the accused's defense at a later trial.

From the viewpoint of a suspect being questioned by federal agents, the option to remain silent is tactically and logically unavailable. The inherent power imbalance between agent and suspect suggests to the latter that his withholding an answer will invite greater suspicion and perhaps even a more aggressive stance from the questioner. This is especially true where the suspect is not told, as Brogan was not, that remaining silent is an available option. Suspects may think they are under an obligation to answer questions propounded by a law enforcement official, and, thus, are unlikely to choose silence over an exculpatory response.

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the suspect's confrontation with the authorities occurred on a public road at a traffic stop, where the intrusion was far less unexpected and shocking than it was to Brogan, who was in the sanctity of his home when the knock at the door came. "[T]he aura of authority surrounding" a law enforcement officer, coupled with the suspect's knowledge that the officer has the discretion to take enforcement action, exerts "pressure on the detainee to respond to questions." *Id.* at 438.

In *United States v. Goldfine*, 538 F.2d 815 (9th Cir. 1976) Judge Ferguson noted, in a similar vein, that:

> any appreciation of the communicative realities must lead to the recognition that standing mute in the face of questions is an exceedingly unnatural response and that "taking the fifth" has been so often accompanied by social ostracism that it is an unwholesome option.

Id. at 822 n.2 (Ferguson, J., dissenting).[4]

In *New Jersey v. Valentin*, 105 N.J. 14, 19, 519 A.2d 322, 324 (1987), the Supreme Court of New Jersey, interpreting a statute making it a crime for an individual "to hinder his own apprehension" when he "[v]olunteers false information to a law enforcement officer," observed that:

> Although the defendant was not constitutionally or statutorily compelled to answer the state trooper, an ordinary person stopped for a motor vehicle violation does not think he is "volunteering" answers to a law-enforcement officer's inquiries. Few persons under such circumstances think that they can refuse to answer. On the contrary, most believe that failure to respond will only lead to further involvement with the police officer. 3 W. LaFave, *Search & Seizure*, ¶ 9.2, at [3]52-55 (1978). *See generally United States v. Mendenhall*, 446 U.S. 544, 544-[47], 100 S.Ct. 1870, 1871-73, 64 L.Ed.2d 497, 509-11 (1980) (recognizing the substantial assertion of governmental authority involved when a law-enforcement officer stops an automobile and the likelihood that a citizen would feel constrained to respond to the officer's questions).

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[4]Indeed, the term "Fifth Amendment communist" became a part of the American lexicon precisely because of the wide-spread public belief that anyone invoking his or her Fifth Amendment right against self-incrimination is guilty.

Indeed, a suspect will not only feel that he must answer the propounded question, but that his failure to do so is likely to be treated by the agent as an admission of guilt. *See Moran v. Burbine*, 475 U.S. 412, 462 (1986) (Stevens, J., dissenting) (noting that many questioned suspects "may fear that silence or a request for counsel will be construed as an admission of guilt."). *See also* Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. Chi. L. Rev. 1273, 1276 (1990) (recognizing that "silence may be treated as an admission of culpability"); Erica S. Perl, *United States v. Rodriguez-Rios: The Fifth Circuit Says "Adios!" to the "Exculpatory No" Doctrine*, 69 Tul. L. Rev. 621, 631 n.69 (Dec. 1994) ("[A]s anyone who has been questioned by a police officer--*even in a non-custodial setting*--can confirm, remaining silent effectively is not an option." (emphasis added) (citing, generally, Fred E. Inbau & John E. Reid, *Criminal Interrogation and Confessions* (1962)).

Moreover, silence is not a viable option because it can be used to denigrate and undermine the accused's defense at a subsequent trial. This Court has held that an accused's pre-arrest silence can be used for impeachment. *Jenkins v. Anderson*, 447 U.S. 231, 238, 240 (1980); *Raffel v. United States*, 271 U.S. 494 (1926). More significantly, perhaps, is that there exists ample judicial support for the proposition that the defendant's pre-arrest silence may be used against him at trial as substantive evidence of guilt. *See United States v. Thompson*, 82 F.3d 849, 855 (9th Cir. 1996) (collecting cases).

Thus, the accused may be forced to adopt a trial strategy not so much calculated to promote his success, but instead to avoid the likelihood that his silence will be used to denigrate his defense. The accused may be compelled to select

a strategy that is weak or marginal rather than vigorous and robust.

2. Because the suspect's option to remain silent is illusory, he is thus faced with the legally unacceptable dilemma of self-incrimination or violation of section 1001.

As Giles Birch has observed:

> A guilty suspect who is asked an incriminating question by a federal agent thus faces a harsh trilemma: he must confess his crime, lie and risk punishment under § 1001, or remain silent when silence may be treated as an admission of culpability. A statute that creates such a trilemma punishes suspects for refusing to admit their guilt.

Birch, *supra*, 57 U. Chi. L. Rev. at 1276 (footnote omitted).

A suspect's option to remain silent being illusory, section 1001 actually creates a legally unacceptable, and intolerable, dilemma: self-incrimination or prosecution under section 1001. This is the dilemma that exculpatory no jurisprudence has correctly focused upon in interpreting section 1001 as inapplicable to simple false denials of guilt. *See, e.g.*, *United States v. Payne*, 750 F.2d 844, 862 (11th Cir. 1985); *Lambert*, 501 F.2d at 946 n.4.

The question asked of Brogan by the federal agents who arrived unannounced at his home involved substantial and real hazards of self-incrimination. Their inquiry placed Brogan in the center of the conflict created by the intersection of 1001 and the Fifth Amendment. The central standard for application of the Fifth Amendment privilege is whether the

suspect is confronted by substantial and real, and not merely trifling or imaginary, hazards of self-incrimination. *See Marchetti v. United States*, 390 U.S. 39, 53 (1968).

Brogan was confronted in his home by federal agents seeking to elicit his "cooperation" regarding a criminal matter in which they believed Brogan to be involved. After some preliminary questions, the agents asked him about his acceptance of illegal bribes. By responding in the affirmative, Brogan would have, of course, incriminated himself. With the option of silence an illusory one, his only other viable avenue was to deny guilt and risk prosecution under section 1001. Without the judicial recognition of an exculpatory no exception, a suspect's Fifth Amendment privilege against self-incrimination--the essential mainstay of our adversarial system, *see Miranda v. Arizona*, 384 U.S. 436, 460 (1966)--is rendered meaningless.

To rule otherwise would give the government a powerful tool to avoid its burden of proving a presumptively innocent person guilty. Coercion of a suspect rendered mute by a justifiable fear that his silence may be used against him, into admission of wrongdoing on pain of felony prosecution, violates the spirit of the Fifth Amendment. The government should not be allowed to coerce a person into admitting wrongdoing on pain of felony prosecution. *See Payne*, 750 F.2d at 862 ("It is primarily this solicitude for Fifth Amendment values that prevents us from attaching criminal liability to conduct consisting of mere exculpatory denials of wrongdoing.").

D. A literal reading of the statute can easily lead to absurd results, especially in the hands of an over-zealous prosecutor.

In *Sorrells v. United States*, 287 U.S. 435, 450 (1932), Chief Justice Hughes declared:

> To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts.

More recently, this Court has observed:

> In the ordinary case, absent any "indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it."

Hubbard v. United States, 115 S.Ct. 1754, 1759 (1995) (citations omitted); *see also Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (citing with approval *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571 (1981) ("We have reserved some scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute." (citations and internal quotation marks omitted) (ellipses in original)).

As the Eighth Circuit has recognized:

> [I]f we adopt a literal application of this statute, anything more than a casual social conversation with a Government employee would, without warning, subject the speaker to the possibility of severe criminal punishment. This is a formidable, indeed a dangerous, power the Government assumes the statute invests in law enforcement officials. We cannot blithely assume that Congress granted such a sweeping power.

Friedman v. United States, 374 F.2d 363, 366 (8th Cir. 1967).

That absurd results can ensue upon a literal interpretation of the language of section 1001 is well illustrated by what happened in this case: Brogan was convicted and sentenced to incarceration because of a simple "no" response that was utterly meaningless and inconsequential to the government, its departments, its agencies, its agents, or indeed to anyone else, except, of course, Brogan.

The litany of absurd results a literal interpretation of section 1001 is capable of producing are limited only by the imagination of the United States Attorney. Under such circumstances, there can be no good reason to uphold a literal interpretation of section 1001 so as to permit the statute to be used to punish conduct consisting of nothing more than an exculpatory no.

The notion that citizens can be protected against the pernicious effects of overbroad criminal statutes by reliance on the restraint and discretion of prosecutors has been

emphatically rejected by this Court. *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964). Indeed, in prosecuting Brogan, the United States Attorney flagrantly violated its own clearly articulated policy, then in effect, which provided, "[w]here the statement takes the form of an 'exculpatory no,' 18 U.S.C. § 1001 does not apply regardless [of] who asks the question." United States Attorney's Manual § 9-42.160 (Oct. 1, 1988).

POINT II

THE EVIDENCE OF CONGRESS' RATIFICATION OF THE EXCULPATORY NO DOCTRINE IS CLEAR AND CONSISTENT: FOR FORTY YEARS CONGRESS TOOK NO ACTION TO ABROGATE THE DOCTRINE, DID NOTHING TO AFFECT THE DOCTRINE IN ITS 1996 REENACTMENT OF THE STATUTE, AND APPROVED THE COMMENTARY TO SECTION 3C1.1 OF THE SENTENCING GUIDELINES, WHICH EMBODIES THE DOCTRINE.

In *United States v. Wells*, 117 S.Ct. 921 (1997), this Court stated that "the significance of subsequent congressional action or inaction necessarily varies with the circumstances." *Id.* at 929. The circumstances surrounding Congress' inaction regarding the exculpatory no exception to 18 U.S.C. § 1001 compel the conclusion that Congress has ratified the doctrine.

The inaction, or so-called "silence," of Congress regarding the doctrine does not exist in a vacuum. Laurence

Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L.J. 515, 516, 523-524 (1982). Rather, the legislative history regarding the exculpatory no exception to section 1001 must be considered as a whole. When so considered, it is clear that Congress has ratified this judicially crafted exception to the false statement statute.

A. Congress has acquiesced in the judicially crafted exculpatory no exception to 18 U.S.C. § 1001 by its longstanding inaction in response to the overwhelming acceptance of the doctrine by the federal district courts and circuit courts of appeals.

In construing 18 U.S.C. § 1014, this Court recognized that because judicial opinion was divided over the interpretation of that statute, "[i]t would thus be impossible to say which view Congress might have endorsed." *Wells*, 117 S.Ct. at 929. Regarding section 1001, judicial acceptance of the exculpatory no exception for a mere denial of guilt was consonant for more than forty years. Even as of today, the overwhelming majority of the circuit courts of appeals embrace the doctrine.

After its enactment in 1934, the first federal court to recognize an exception to section 1001 for a denial of guilt in response to questioning by federal agents was *United States v. Levin*, 133 F. Supp. 88 (D. Colo. 1953). In 1962, the Fifth Circuit, in *Paternostro v. United States*, 311 F.2d 928 (5th Cir. 1962) (en banc), was the first appellate court to recognize and adopt the doctrine. Thereafter, seven other circuit courts of appeals also ruled that false negative responses to

questioning by federal officers were not within the purview of section 1001. *See* cases cited *supra* note 2.

For a span of more than forty years, until the Fifth Circuit's 1994 decision in *Rodriguez-Rios*, there existed overwhelming acceptance of the exculpatory no doctrine by all the district and circuit courts that ruled on it. This widespread and prevailing judicial landscape alone justifies the conclusion that Congress was well aware of the existence of the exculpatory no doctrine. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

This Court has presumed congressional acquiescence in a judicial interpretation of a federal statute when Congress has been aware of the interpretation by numerous federal courts and failed to amend the statute over an extended period of time. *E.g.*, *Evans v. United States*, 504 U.S. 255, 268-269 (1992) (stating that in light of a silent and aware legislature, "[o]ur conclusion is buttressed by the fact that so many other courts that have considered the issue over the last 20 years have interpreted the statute in the same way." (footnote and citations omitted)); *United States v. Ryan*, 284 U.S. 167, 175 (1931) ("[W]e should hesitate to set aside, at this late date, the uniform construction given to the section with respect to this question by the lower federal courts for more than sixty years.") (citations omitted)); *see also Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-84 (1982); *Flood v. Kuhn*, 407 U.S. 258, 273-74 (1972).

B. When Congress reenacted section 1001 in 1996, it ratified the exculpatory no doctrine by declining to accept a proposed limitation upon it, while at the same time adopting other significant judicial interpretations of the statute set forth in the proposed Criminal Code Reform Act of 1981.

In 1981, as part of many proposed revisions to the criminal code, the Committee on the Judiciary proposed several changes to section 1001 to specifically clarify judicial interpretation of the statute. These included the scope of the statute's jurisdiction, whether materiality applied to all of its elements, and whether the exculpatory no defense was to be more narrowly construed. Congress did not adopt these amendments by the end of its session.

In fact, in 1981 Congress declined to limit the exculpatory no doctrine after consideration of the Judiciary Committee's proposed changes, which were based on many years of the combined efforts of members of both houses[5] of

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[5] *See* Senate Comm. on the Judiciary, Report on the Criminal Code Reform Act of 1981, S. Rep. No. 307, 97th Cong., 1st Sess. (1981). This bill to codify, revise, and reform title 18 of the United States Code was based on the "Committee's composite of the best features of the Report of the National Commission on Reform of Federal Criminal Laws (footnote omitted) [1971], prior bills in the Ninety-Third, Ninety-Fourth, Ninety-Fifth, and Ninety-Sixth Congresses, and comments, suggestions, and amendments received during hearings, conferences, and markups on this proposal." S. Rpt. 97-307 at 1 & n.1 (1981) (citation omitted). *See also* House Comm. on the Judiciary, Report on the Criminal Code Revision Act of 1980, H.R. Rep. No. 1396, 96th Cong., 2d Sess. 178-79, 182 (1980); *see generally*, Robert Drinan et al., *The Federal Criminal Code: the Houses are Divided*, 18 Am. Crim.L. Rev. 509 (1981); L. Schwartz,

Congress. The Committee urged Congress to adopt a very narrow construction of the exculpatory no doctrine, one that made the exception "available only when the false statement consists solely of a denial of involvement in a crime." S. Rep. No. 97-307, at 407 (1981). At the time Congress was urged to adopt this narrow exception, federal courts had accepted the exculpatory no doctrine for false statements by defendants that were made under circumstances significantly broader than a simple denial of guilt. *See, e.g., Bedore*, 455 F.2d at 1110 (giving a false name not within the class of false statements that section 1001 was designed to proscribe); *Levin*, 133 F. Supp. at 88-89 (defendant stated and represented to FBI that he did not have information as to the identity of owner of emerald ring).

Congress, cognizant of the broad interpretation of the exculpatory no doctrine, *Cannon*, 441 U.S. at 696-97, nevertheless chose against limiting the exculpatory no exception, and did not change the statute. In the ensuing years, three circuit courts of appeals joined the five that had already adopted the exculpatory no doctrine. *See United States v. Taylor*, 907 F.2d 801, 805 (8th Cir. 1990); *United States v. Cogdell*, 844 F.2d 179, 183 (4th Cir. 1988); *United States v. Tabor*, 788 F.2d 714, 717-19 (11th Cir. 1986). Yet, Congress still declined to amend the statute. The circumstances of this congressional inaction unmistakably indicate Congress' acquiescence in the doctrine.

Moreover, when Congress undertook to reenact section 1001 in 1996, it amended the statute in accordance with the Judiciary Committee's 1981 proposals in response to

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judicial interpretations of the statute's materiality requirement, *see* H.R. Rep. No. 104-680, at 3942 (July 16, 1996) ("Importantly, the offense in each of the three paragraphs has 'materiality' as an element. This express requirement . . . resolves a conflict among circuits as to whether materiality is an element of all three offenses . . . ."), and of its jurisdictional reach, *Id.* at 3941-42 (amending the statute to return "the scope of section 1001 to its pre-*Hubbard* status, by explicitly providing that section 1001 covers all three Federal branches."). Notably, this 1996 reenactment of the statute did not adopt the overly limited false denial exception proposed by the Judiciary Committee in 1981. *See* False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (amending 18 U.S.C. § 1001).

This Court has repeatedly stated its reliance upon congressional reenactment of a statute without relevant change as indicating Congress' knowledge and approval of the prevailing interpretation by the judiciary. *See, e.g., Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994) ("When Congress reenacts statutory language that has been given a consistent judicial construction, we often adhere to that construction in interpreting the reenacted statutory language." (citations omitted)); *see also* Tribe, *supra*, 57 Ind. L.J. at 529 ("Congress' silence respecting extant *decisional law* that had construed the very statutory language Congress has chosen to re-enact--a silence which, coupled with re-enactment, may be read to imply adoption of that law . . . ." (footnotes omitted) (emphasis in original)).

C. Congress has demonstrated its acceptance of the exculpatory no doctrine by twice approving an exception to the obstruction of justice sentencing enhancement provision for false denials of guilt.

Section 3C1.1 of the United States Sentencing Guidelines requires that a sentencing court add a two-level enhancement to a defendant's base offense level for obstruction of the administration of justice. However, Application Note 1 to the Commentary of that section states that "[a] defendant's denial of guilt . . . is not a basis for application of this provision." This commentary embodies the very essence of the exculpatory no doctrine. Although under no statutory obligation to submit commentary or amendments thereto to Congress, this language has on two occasions been submitted by the United States Sentencing Commission to Congress for its approval. On both occasions, Congress reviewed and approved the commentary, thus demonstrating its acceptance of the exculpatory no doctrine.

1. Although not required to do so, the United States Sentencing Commission has submitted to Congress for its review both the original and amended commentary to section 3C1.1.

The United States Sentencing Commission (the "Commission") was created by Congress under the Sentencing Reform Act of 1984, as amended, 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV), and 28 U.S.C. §§ 991-998 (1982 ed., Supp. IV). *See United States v. Mistretta*, 488 U.S. 361, 362 (1989). Congress directed the Commission to promulgate guidelines and general policy statements for use by the federal

courts in determining criminal sentences, 28 U.S.C. §§ 991(a) and 994(a), and required the Commission to submit its initial guidelines for review by April 13, 1987. Pub. L. No. 98-473, § 235 (1984), *reprinted at* 18 U.S.C. § 3551; United States Sentencing Commission Sentencing Guidelines and Policy Statements 1.1 (Apr. 13, 1987) (the "1987 Guidelines").

After the prescribed 180-day period of congressional review, the 1987 Guidelines took effect automatically on November 1, 1987. *Id.* "Although the Commission was required only to submit `sentencing guidelines' to Congress, Pub.L. No. 98-473, § 235(a)(1)(B) 98 Stat. 1837, 2031-32, the Commission submitted commentary along with the guidelines, *see* United States Sentencing Commission, Sentencing Guidelines and Policy Statements (Apr. 13, 1987)." *United States v. Anderson*, 942 F.2d 606, 609 (1991); *see also* 1987 United States Sentencing Commission Annual Report 1.[6] Thus, Congress' approval of the submissions of the guidelines package that took effect on November 1, 1987 included its approval of the original commentary to section 3C1.1, stating that *"[a] defendant's denial of guilt is not a basis for application of this provision."* United States Sentencing Commission, Sentencing Guidelines and Policy Statements, § 3C1.1, comment. (Apr.13, 1987) (italics in original).

Moreover, by its approval of the Commission's 1990 reorganization of the application notes to section 3C1.1, Congress left no doubt that it did not intend to punish a defendant for a simple denial of guilt. *See* U.S.S.G. § 3C1.1,

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[6]28 U.S.C. § 994(w) requires the Commission "to submit to Congress at least annually an analysis of the operation of the guidelines." *Mistretta*, 488 U.S. at 309.

comment. (n.1) (West 1993) (App. C., n.347, amended November 1, 1990). The Commission is "under an obligation to periodically 'review and revise' the guidelines," *Mistretta*, 488 U.S. at 369 (quoting 28 U.S.C. § 994(o)), and to submit these amendments to Congress for review and approval. *Id.* (citing 28 U.S.C. § 994(p)). There is, however, no statutory requirement for congressional review of amendments to commentary. *See Anderson*, 942 F.2d at 609. In fact, this Court has noted that Congress may not review all amended commentary. *See Stinson v. United States*, 113 S.Ct. 1913, 1919 (1993). Nevertheless, for all relevant years, the Commission has submitted to Congress its amendments to the commentary along with its amendments to the guidelines and policy statements. *See* 1989 United States Sentencing Commission Annual Report 19; 1990 United States Sentencing Commission Annual Report 23-24. Therefore, Congress has approved the amendments to the Official Commentary to § 3C1.1 of the Sentencing Guidelines. By approving the Sentencing Commission's 1987 Guidelines as well as the 1990 reorganization and clarification of U.S.S.G. § 3C1.1, Congress has made clear its unwillingness to punish a person for uttering a simple denial of guilt.

2. Congress' approval of the Commentary to section 3C1.1 demonstrates its assent to the exculpatory no doctrine.

Section 3C1.1 of the United States Sentencing Guidelines requires that a sentencing court add a two-level enhancement to a defendant's base offense level for obstruction of the administration of justice. Among the types of conduct to which the enhancement is intended to apply is the making of "a materially false statement to a law

enforcement officer that significantly obstructed or impeded the official investigation or prosecution of the instant offense." U.S.S.G. § 3C1.1, comment. (nn.2 & 3). However, Application Note 1 to the Commentary of that section states that *"[a] defendant's denial of guilt . . . is not a basis for application of this provision."* *Id.* at comment. (n.1) (italics in original).

It is abundantly clear from the language of the commentary that the Commission did not intend to punish a defendant for conduct constituting an exculpatory no. *See, e.g., United States v. Surasky*, 976 F.2d 242, 245 n.3 (5th Cir. 1992) ("The denial of guilt exception to U.S.S.G. 3C1.1 finds a rough analog in the so-called 'exculpatory no' doctrine established in [*Paternostro*]."); *United States v. Urbanek*, 930 F.2d 1512, 1515 (10th Cir. 1991) (holding that sentencing judge committed clear error by enhancing defendant's sentence for obstruction of justice on the basis of statements that "amounted to nothing more than a denial of guilt or an 'exculpatory no'"); *United States v. Brown*, 944 F.2d 1377, 1386 (7th Cir. 1991) (holding that "statements that go *beyond* the simple denial of guilt protected by the 'exculpatory no' doctrine . . . clearly warrant application of the § 3C1.1 enhancement") (emphasis added)); *see also, United States v. Johns*, 27 F.3d 31, 35 (2d Cir. 1994) (citing with approval *Surasky* and *Urbanek*).

In sum, when the activities of Congress are considered as a whole, rather than as discrete and unrelated parts, it is evident that it was never the intent of Congress that a false "no" response was to be a valid basis for conviction under 18 U.S.C. § 1001.

POINT III

THE SECOND AND FIFTH CIRCUITS' REJECTION OF THE EXCULPATORY NO DOCTRINE IS ERRONEOUS

The Second Circuit in this case and the Fifth Circuit in *Rodriguez-Rios* rejected the exculpatory no doctrine. That rejection was based on those courts' failure to properly consider and comprehend the foregoing compelling reasons favoring acceptance of the doctrine.

While the Second Circuit attempted to justify the fairness of Brogan's conviction by noting that the agents informed him that false statements were illegal, the court failed to point out that the notice was not given by the agents until *after* Brogan's "no" response. *Wiener*, 96 F.3d at 36, 40. Moreover, whereas the Second Circuit suggests that Brogan could have legally extricated himself by recanting his answer, *id.* at 36, that is most definitely not the law. Unlike, for example, 18 U.S.C. § 1623, which proscribes perjury before courts and grand juries, but specifically provides in subdivision (d) that a witness' recantation "shall bar prosecution," there exists no similar provision in 18 U.S.C. § 1001 and no case supports the notion that an actionable false statement under section 1001 is rendered unprosecutable if recanted.

CONCLUSION

For the foregoing reasons, Petitioner requests this Court to reverse the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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